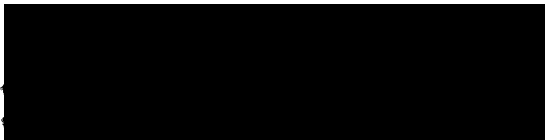


U.S. Department of Homeland Security
20 Massachusetts Ave., N.W., Rm. A3042
Washington, DC 20529



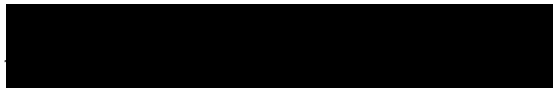
U.S. Citizenship
and Immigration
Services



FILE: EAC 02 166 53149 Office: VERMONT SERVICE CENTER

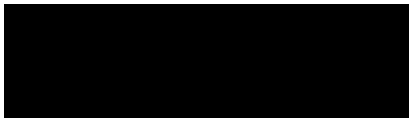
Date: OCT 14 2004

IN RE: Petitioner:
Beneficiary:



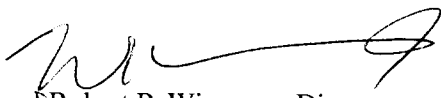
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.


Robert P. Wiemann, Director
Administrative Appeals Office

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identifying data deleted to
prevent disclosure of unclassified
information and protect privacy

DISCUSSION: The nonimmigrant visa petition was denied by the Director, Vermont Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is described as a business engaged in the wholesale and retail of electrical goods. The petitioner claims to be a subsidiary of Auto and Electro Care Ltd., located in Nairobi, Kenya. It seeks to employ the beneficiary temporarily in the United States as its president for three years, at an annual salary of \$37,500.00.

The director determined that the petitioner had not submitted sufficient evidence to demonstrate that the beneficiary would be employed primarily in a managerial or executive capacity with the U.S. entity.

On appeal, counsel disagrees with the director's determination and asserts that the beneficiary's duties will be managerial or executive in nature.

To establish L-1 eligibility under section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1101(a)(15)(L), the petitioner must demonstrate that the beneficiary, within three years preceding the beneficiary's application for admission into the United States, has been employed abroad in a qualifying managerial or executive capacity, or in a capacity involving specialized knowledge, for one continuous year by a qualifying organization, and seeks to enter the United States temporarily in order to continue to render his or her services to the same employer or a subsidiary, or affiliate thereof in a capacity that is managerial, executive, or involves specialized knowledge.

The regulation at 8 C.F.R. § 214.2(l)(1)(ii) states, in part:

Intracompany transferee means an alien who, within three years preceding the time of his or her application for admission into the United States, has been employed abroad continuously for one year by a firm or corporation or other legal entity or parent, branch, affiliate, or subsidiary thereof, and who seeks to enter the United States temporarily in order to render his or her services to a branch of the same employer or a parent, affiliate, or subsidiary thereof in a capacity that is managerial, executive, or involves specialized knowledge.

The regulation at 8 C.F.R. § 214.2(l)(3) states that an individual petition filed on Form I-129 shall be accompanied by:

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (1)(1)(ii)(G) of this section.
- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.
- (iii) Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization with the three years preceding the filing of the petition.
- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended serves

in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The issue to be addressed in this proceeding is whether the petitioner has established that the beneficiary's employment with the U.S. entity will be primarily managerial or executive in nature.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

The term "managerial capacity" means an assignment within an organization in which the employee primarily—

- (i) Manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) Supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) If another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- (iv) Exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), provides:

The term "executive capacity" means an assignment within an organization in which the employee primarily—

- (i) Directs the management of the organization or a major component or function of the organization;
- (ii) Establishes the goals and policies of the organization, component, or function;
- (iii) Exercises wide latitude in discretionary decision-making; and
- (iv) Receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

The petitioner stated in the petition that the beneficiary's proposed duties would consist of implementing planned business operations, expansion, sales, marketing, and investment.

In response to the director's request for additional information, the petitioner submitted a copy of the U.S. entity's business plan and organizational chart. The petitioner indicates in the business plan that the U.S. entity will commence its operations following the approval of the petition, and outlines a two-year period plan for operations. The petitioner describes the beneficiary's proposed duties as: "head of U.S. operations/marketing, administration, management and overall in charge of personnel." The petitioner also lists proposed subordinate positions to include: marketing executive, three sales executives, and accountant.

The director denied the petition after determining that the petitioner failed to establish that the beneficiary would be employed by the U.S. entity primarily in a managerial or executive capacity. The director noted that the description of the beneficiary's job duties was vague and that the evidence was insufficient to demonstrate that the beneficiary would be involved in the supervision and control of the work of other supervisory, professional, or managerial employees who could relieve him from performing the services of the corporation.

On appeal, counsel disagrees with the director's decision and asserts that the evidence was sufficient to establish that the beneficiary would be employed primarily in a managerial or executive capacity. Counsel further asserts that the reasons given for the denial were arbitrary.

The petitioner indicated that the U.S. entity would commence doing business in April of 2002, once the instant petition had been improved. Contrary to the petitioner's contentions, commencement of business operations cannot be contingent upon approval of an initial petition. To qualify as a new office there must be a showing that commencement procedures, including incorporation, obtaining a bank account, acquiring physical premises to house the new office, and having sufficient funding to begin operations, have already begun to take place. *See* 8 C.F.R. § 214.2(1)(3)(v). Furthermore, when a new business is established and commences operations, the regulations recognize that a designated manager or executive responsible for setting up operations will be engaged in a variety of activities not normally performed by employees at the executive or managerial level and that often the full range of managerial responsibility cannot be performed. In order to qualify for L-1 nonimmigrant classification during the first year of operations, the regulations require the petitioner to disclose the business plans and the size of the United States investment, and thereby establish that the proposed enterprise will support an executive or managerial position within one year of the approval of the petition. *See* 8 C.F.R. § 214.2(1)(3)(v)(C). This evidence should demonstrate a realistic expectation that the enterprise will succeed and rapidly expand as it moves away from the developmental stage to full operations, where there would be an actual need for a manager or executive who will primarily perform qualifying duties.

In the instant matter, the business plan submitted by the petitioner fails to detail accurate, realistic projections to establish that the U.S. entity will realize growth within one year. Although the business plan and organizational chart demonstrate that the U.S. entity intends to hire new employees, it has not provided detailed position descriptions to show how their positions will interrelate with that of the beneficiary, the percentage of time to be spent performing said duties, or that the positions are anything other than non-professional positions. Furthermore, neither the business plan nor the organizational chart depicts projected dates of hire.

The definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high level responsibilities that are specified in the definitions. Second, the petitioner must prove that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991).

Based on the current record, the AAO is unable to determine whether the claimed managerial duties constitute the majority of the beneficiary's duties, or whether the beneficiary primarily performs non-managerial administrative or operational duties. Although specifically requested by the director, the petitioner's description of the beneficiary's job duties does not establish what proportion of the beneficiary's duties will be managerial in nature, and what proportion will actually be non-managerial. *See Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991). The petitioner lists the beneficiary's duties as including both managerial and administrative or operational tasks, but fails to quantify the time the beneficiary will spend on them. This failure of documentation is important because several of the beneficiary's daily tasks, such as sales, marketing, and administration do not fall directly under traditional managerial duties as defined in the statute. For this reason, the AAO cannot determine whether the beneficiary will be primarily performing the duties of a function manager. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

On review, the petitioner has provided a vague and nonspecific description of the beneficiary's duties that fails to demonstrate what the beneficiary does on a day-to-day basis. For example, the petitioner states that the beneficiary's duties include sales, marketing, and administration. The petitioner did not, however, define the sales, marketing, and administrative tasks to be performed by the beneficiary. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

Although the petitioner asserts that the beneficiary will be managing a subordinate staff, the record does not establish that the subordinate staff will be composed of supervisory, professional, or managerial employees. *See* section 101(a)(44)(A)(ii) of the Act. A first-line supervisor will not be considered to be acting in a managerial capacity merely by virtue of his or her supervisory duties unless the employees supervised are professional. Section 101(a)(44)(A)(iv) of the Act. Because the beneficiary will be primarily supervising a staff of non-professional employees, the beneficiary cannot be deemed to be primarily acting in a managerial capacity.

Based upon the evidence presented, the petitioner has failed to demonstrate that the beneficiary will be employed primarily in a managerial or executive capacity or that the U.S. entity will be able to support such a position within one year of operation. Accordingly, the appeal will be dismissed.

Beyond the decision of the director, a related issue is whether the petitioner has established that it has secured sufficient physical premises to house the new office. The petitioner indicated that a lease agreement would be entered into once the petition had been approved. Therefore, by the petitioner's own admission, there had not been sufficient physical premises secured at the time the petition was filed. Another issue not directly addressed by the director is whether the beneficiary has been employed for one continuous year within three years preceding the filing of the petition primarily in a managerial or executive capacity. The petitioner stated in the petition that the beneficiary had been responsible for administration, marketing, sales, personnel

management, and the day-to-day operations of the foreign entity. The petitioner also stated that the beneficiary had been employed by the foreign entity “since today without any interruptions.” The evidence fails to demonstrate the period of employment or how the beneficiary performed as a manager or executive. A final issue not directly addressed by the director is the size of the United States investment and the financial ability of the foreign entity to remunerate the beneficiary and to commence doing business in the United States. In the instant case, the record shows an initial deposit of \$20,000.00 into the U.S. entity’s bank account at First Union Bank. This evidence is insufficient to demonstrate that sufficient capital has been invested and will be available to cover all business expenses, including the beneficiary’s salary, which is indicated to be \$37,500.00. *See* 8 C.F.R. § 214.2(1)(3)(v). For these additional reasons, the petition may not be approved.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the act, 8 U.S.C. 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.